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No. 513

In the Supreme Court of the United States

OCTOBER TERM, 1960

ELEANOR ZIRIN, PETITIONER

v.

E. A. MCGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

ALAN S. ROSENTHAL,
W. HAROLD BIGHAM,
Attorneys,
Department of Justice,
Washington 25, D. C.

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After having received notice of unsatisfactory service, an unsatisfactory performance rating, and an opportunity to answer the charges, petitioner was discharged by the District Director of Internal Revenue from her position as a window teller in the Internal Revenue Service at Philadelphia, Pennsylvania. Appeals were denied successively by the Performance Rating Board of Review, the Regional Com-

missioner of Internal Revenue, the Commissioner of Internal Revenue, the Civil Service Commission, and the Board of Appeals and Review of the Civil Service Commission.

In an action for reinstatement, petitioner contended that authority to discharge employees had never been delegated from the Secretary of the Treasury to the Commissioner of Internal Revenue, and hence that the Commissioner's purported delegation of such authority to the District Director was ineffective. The district court held that Treasury Department Order 150-27 (Pet. 34) impliedly made such a delegation to the Commissioner. The court of appeals construed that Order as not including separation powers and, in its original decision, reversed (Pet. 39-44). On rehearing *en banc*, the court's attention was called to other outstanding departmental orders and directives —in particular, Supplement 5 to Personnel Circular 109 (Pet. 34-35)—which the court held did contain the necessary delegation (Pet. 46-56).

The court of appeals' decision *en banc* is, we believe, plainly correct, but in any event the interpretation of internal departmental directives is not a question appropriate for review by this Court. Petitioner also objects to the Government's reliance on rehearing upon directives which had not been relied upon in the district court and to the court of appeals' taking judicial notice of those directives. An appellee, however, is entitled to defend its judgment on any ground supported by the record or susceptible of judicial

notice, whether or not raised in the trial court,[1] and judicial notice has frequently been taken of reports and publications of Government agencies of no greater dignity than the orders and circulars involved here,[2] the authenticity of which, moreover, petitioner has never questioned.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ALAN S. ROSENTHAL,
W. HAROLD BIGHAM,
Attorneys.

NOVEMBER 1960.

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[1] See, *e.g.*, *LeTulle* v. *Scofield*, 308 U.S. 415; *Langnes* v. *Green*, 282 U.S. 531; *United States* v. *American Ry. Express Co.*, 265 U.S. 425; *Standard Accident Ins. Co.* v. *Roberts*, 132 F. 2d 794 (C.A. 8). In *Commissioner* v. *Belridge Oil Co.*, 267 F. 2d 291 (C.A. 9), and *General Utilities & Operating Co.* v. *Helvering*, 296 U.S. 200, cited by petitioner (Pet. 15, 16), the appellant was attempting to obtain a *reversal* of a judgment on a ground not presented to the district court.

[2] See, *e.g.*, *New York Indians* v. *United States*, 170 U.S. 1, 32; *Caha* v. *United States*, 152 U.S. 211, 221; *Fletcher* v. *Jones*, 105 F. 2d 58 (C.A.D.C.); *Chas. C. Steward Mach. Co.* v. *Davis*, 89 F. 2d 207, 210 (C.A. 5) affirmed, 301 U.S. 548; *Nev-Cal Electric Securities Co.* v. *Imperial Irrigation Dist.*, 85 F. 2d 886, 905 (C.A. 9). Cf., *Minnesota* v. *United States*, 305 U.S. 382, 390; *A.T.&T. Co.* v. *United States*, 299 U.S. 232, 240-241.

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